

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission)	
On Its Own Motion)	
)	
Investigation concerning)	01-0662
Illinois Bell Telephone Company's)	
compliance with Section 271 of the)	Phase 2
Telecommunications Act of 1996)	

PHASE II BRIEF OF CIMCO COMMUNICATIONS, INC.
AND FORTE COMMUNICATIONS, INC.

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Introduction

The 1996 Telecommunications Act laid out standards Bell Operating Companies (BOCs) must meet in order to provide interLATA telecommunications service. 47 USCS § 271(c)(2)(B) puts forth 14 checklist items that must be satisfied. Of particular importance to CIMCO Communications, Inc. (CIMCO) and Forte Communications, Inc. (Forte) is SBC's obligation to provide nondiscriminatory access to its Operations Support Systems (OSS). One way to measure a BOC's provision of OSS is to track its compliance with Performance Measures (PMs). That task was undertaken by BearingPoint and to a lesser extent Ernst & Young (E&Y).

The BearingPoint audit is not the exclusive measure of SBC's OSS. In fact, Staff witness Ms. Weber noted that "if BearingPoint's test did not reveal a deficiency with SBC Illinois' OSS it does not mean that the OSS is free of problems, deficiencies, or other impediments to proper functioning.

BearingPoint's review of each evaluation criteria was conducted during defined time periods and the scope of BearingPoint's evaluation did not cover all aspects of SBC Illinois' OSS or all business processes that support its OSS."¹ Thus, the parties are in agreement that whatever BearingPoint did it was not comprehensive of many experiences actually encountered by CLECs. It was a narrowly defined test, a mere window in time of particular observations. It was up to the parties to bring in additional evidence of specific issues encountered in their real life experience. Real life examples are significant because they are not dependant on maintaining confidentiality of the orders submitted by a pseudo CLEC nor subject to narrow testing of a mere observer in a wholesale carrier world. Forte and CIMCO, among others, supplemented the record with real operational deficiencies in SBC's OSS.

CIMCO and Forte presented discussion and data regarding several aspects of SBC's OSS that were not directly measured or examined by BearingPoint and/or E&Y. However, CIMCO's and Forte's data is directly relevant to SBC's ability to provide nondiscriminatory OSS and is therefore directly relevant to whether SBC is deserving of 271 authorization. BearingPoint's audit as well as CIMCO's and Forte's data demonstrate that SBC provides discriminatory access to OSS and therefore does not comply with 47 USCS 271(c)(2)(B)(ii).

SBC attempts to minimize the significance of particular problems, especially in cases where it concedes the complaining carrier is correct. In numerous instances SBC affiants assure us that a problem is not systemic. In

¹ ICC Staff Ex. 43.0 (Weber) at ¶21.

other cases SBC asserts issues are limited in application because of human error. These are merely excuses. None of this approximates what is at issue -- SBC must demonstrate it has complied with 271 requirements.

Another factor that evidences whether SBC is in compliance with Section 271 is a remedy plan that is sufficient to prevent backsliding by a BOC in a post-271 approval environment. SBC asks the ICC to abandon the Commission-approved 01-0120 Remedy Plan in favor of SBC's "compromise" remedy plan. The Commission should not entertain SBC's request. Staff witness Ms. Patrick concluded that the "performance remedy plan offered by SBCI in this present proceeding would not sufficiently prevent backsliding in a post-271 approval environment." Ms. Patrick further recommended that the Commission condition any positive 271 recommendation on SBC's agreement to proceed with the ICC-approved 01-0120 Remedy Plan. Staff's conclusion was further supported by the initial remedy plan affidavits of Forte² and CIMCO³. Forte and CIMCO demonstrated that SBC's "compromise" plan would not be sufficient to compensate CLECs for poor SBC performance and would in fact encourage backsliding rather than prevent it.

I. Checklist Item 2 – Access to Network Elements – OSS

Checklist item 2 of section 271 states that a BOC must provide "nondiscriminatory access to network elements in accordance with the

² Forte 1.1.

³ CIMCO 1.1.

requirements of sections 251(c)(3) and 252(d)(1)" of the Act.⁴ Under checklist item 2, a BOC must demonstrate that it provides non-discriminatory access to five OSS functions: (1) pre-ordering; (2) ordering; (3) provisioning; (4) maintenance and repair; and (5) billing. The FCC utilizes a two-step approach to analyze whether a BOC has met the nondiscriminatory requirements for each OSS function. First, it determines "whether the BOC has deployed the necessary systems and personnel to provide sufficient access to each of the necessary OSS functions and whether the BOC is adequately assisting competing carriers to understand how to implement and use all of the OSS functions available to them."⁵ Under this requirement, a BOC must show that it has developed sufficient electronic and manual interfaces to allow competing carriers equivalent access to all of the needed OSS functions.

Secondly, the FCC must then determine "whether the OSS functions that the BOC has deployed are operationally ready, as a practical matter."⁶ The Commission may examine performance measurements and other evidence of commercial readiness to determine whether the BOC's OSS is able to handle current and projected demand. "The most probative evidence that OSS functions are operationally ready is actual commercial usage."⁷ Third party testing may also provide evidence of commercial readiness and viability.

Staff and various CLECs have demonstrated that SBC does not meet the requirements of checklist item 2. The ICC Staff noted that SBC continues to fail

⁴ 47 U.S.C. § 271(c)(2)(B)(ii).

⁵ Bell Atlantic New York 271 Order, ¶87.

⁶ Id. at ¶89.

⁷ Id.

11 performance measures (PMs 7.1, 10.1, 10.2, 10.3, 10.4, 11.1, 13, 17, MI 2, MI 13, and MI 14).⁸ Staff concluded that the three months of PM data supplied by SBC does not support its assertion that it has complied with the requirements of checklist item 2 (as well as checklist items 4, 7 and 17).⁹ Additionally, CIMCO and Forte documented several deficiencies in SBC's OSS as part of their respective Initial¹⁰ and Reply¹¹ Affidavits.

A. THE BEARINGPOINT AUDIT CONFIRMS THAT SBC PROVIDES DISCRIMINATORY OSS IN VIOLATION OF §271(c)(2)(B)(ii).

Staff concluded that SBC's OSS, as reported by BearingPoint during its third party review, fails with respect to certain aspects of ordering, provisioning, maintenance and repair, and billing.¹² Staff witness Ms. Weber recommended that SBC be required to address five remaining deficiencies (TVV1-28, TVV4-27, TVV7-14, TVV1-4, and PPR13-4) with respect to the "not satisfied" findings from the BearingPoint Operational Report. Several of the "not satisfied" findings are interrelated with the OSS issues that were described by CIMCO and Forte. For example, ordering functionality (TVV1-4), timeliness of Service Order Completion (SOC) responses (TVV1-28) and internal bill accuracy controls (PPR13-4) are similar to some of the specific OSS problems Forte and CIMCO identified. The "military" type testing approach was used in which a particular issue was retested until it received a passing mark. However, the issues documented by Forte and CIMCO did not receive the benefit of such testing. Instead, SBC preferred to

⁸ ICC Staff Affidavit 41.0 (McClerren) at ¶37.

⁹ Id. at ¶13.

¹⁰ See CIMCO 1.0 and Forte 1.0.

¹¹ See CIMCO 2.0 and Forte 2.0.

¹² ICC Staff Exhibit 40.0 (Hoagg) at ¶7.

maintain its focus on the narrowly tailored BearingPoint tests and E&Y's limited review of some of those tests.¹³

B. THE OSS ISSUES DOCUMENTED BY CIMCO AND FORTE PROVIDE FURTHER EVIDENCE THAT SBC'S OSS IS DISCRIMINATORY.

Forte and CIMCO submitted hundreds of observations regarding SBC's failure to provide non-discriminatory wholesale services. Thus, the documented record in this case does not simply consist of the narrow window of BearingPoint and E&Y positions. Rather, the record is replete with empirical evidence provided by CLECs such as Forte and CIMCO that highlights the real life discriminatory conduct by SBC and how it has materially impeded CLEC operations. Forte provided documentation, including data, on various defects in SBC's OSS including, invalid rejects, invalid USOCs/invalid prices, invalid formatting of telephone numbers (TNs), working service conflicts, and invalid completion notices. Likewise, CIMCO provided documentation of SBC OSS deficiencies, including invalid rejects, order completions and defects in SBC's EDI ordering systems. These are defects that were not necessarily tested for by BearingPoint. Nevertheless, the SBC OSS deficiencies establish that SBC does not meet its obligation under 47 USCS 271(c)(2)(B)(ii).

i. Invalid Rejects

Forte and CIMCO have each had recurring problems receiving invalid rejects on orders issued to SBC. When an order is invalidly rejected, it gets returned to the CLEC, even though the order should proceed through SBC's

¹³ For instance, E&Y inexplicably threw out hundreds of observations at the request of SBC personnel, even though the evidence indicated there were continuing problems with SBC processes.

systems. An invalid reject of an order is a reject that is caused by SBC error. CLECs must then spend time and money to determine the cause of the reject, only to find out that the order was valid as originally sent. The invalid reject issue illustrates an area where the scope of the BearingPoint audit was evidently too narrow to diagnose common problems CLECs have with orders. Invalid rejects directly evidence defects in SBC's OSS that inhibit CLECs' ability to compete with SBC on equal footing.

As part of their respective affidavits Forte and CIMCO provided data on invalid rejects. In particular, Forte provided data on one common SBC invalid reject – "TN Invalid or Unavailable." SBC witness Mr. Cottrell attempted to discount Forte's data, while relying on BearingPoint's test. Mr. Cottrell points out that at present BearingPoint only has one outstanding issue pertaining to this issue regarding invalid rejects of line sharing orders.¹⁴ To Mr. Cottrell that "confirm[s] the satisfactory performance of SBC's ordering systems and service representatives regarding the editing of CLEC orders."¹⁵ However, contrary to Mr. Cottrell's assertion, BearingPoint's data is not a complete representation of SBC's OSS performance. Forte provided SBC's Defect Report¹⁶ from CLEC Online of 2/17/03 as part of its Reply Affidavit to illustrate the 61 open invalid defects in SBC's systems. These are defects that E&Y agreed might take weeks or months for SBC to resolve.¹⁷

¹⁴ Cottrell Rebuttal Affidavit at ¶61.

¹⁵ Id.

¹⁶ The CLEC online defect report was attached to Forte's Reply Affidavit as Exhibit A.

¹⁷ Tr. 2452

BearingPoint's limited review is not the "confirmation" that Mr. Cottrell would have the Commission hang its hat on. Forte's initial affidavit documented 328 invalid SBC rejects for "TN Invalid or Unavailable" – an invalid reject rate of five percent.¹⁸ Invalid rejects have been a persistent problem for Forte for over one year.

SBC acknowledges an "intermittent system problem" that it claims was fixed in December 2002.¹⁹ However, as described by Mr. Waterloo, Forte's call logs and tracking data indicate a far different scenario than the one described by SBC. In February of 2003, Forte received 14 invalid rejects for "TN invalid or unavailable."²⁰ Forte was told in May of 2002 that this problem had been fixed, but Forte has received invalid rejects for "TN invalid or unavailable" every month since. SBC states it is "not aware of any occurrences since December 2002", even though Forte provided data in its Initial Affidavit that shows 12 invalid rejects from February 1-17, 2003. In his Surrebuttal Affidavit, SBC witness Mr. Cottrell acknowledges that SBC's "fix" has not solved the problem and SBC "is investigating what appears to be another problem that is generating this error message."²¹ Mr. Cottrell further shifts the blame to Forte, stating that the error is related to Forte's use of placeholders supported by SBC's LSOG 4 EDI to populate its orders.²² However, whether SBC's invalid reject is the result of using "placeholders" in SBC's LSOG 4 EDI does not negate the fact that it is SBC's

¹⁸ See Forte 1.0 at page 2. Within its Reply Affidavit, Forte updated its data for February of 2003.

¹⁹ Cottrell Rebuttal Affidavit at ¶64.

²⁰ Forte 2.0 at 3-4.

²¹ Cottrell Surrebuttal Affidavit at ¶35.

²² Id. at ¶36.

OSS that is causing these invalid rejects. TN invalid or unavailable rejects are the result of a defect in SBC's OSS and not simply an "intermittent system problem".

Other CLECs evidenced similar problems with SBC's OSS. CIMCO documented SBC invalid rejects beyond "TN invalid or unavailable". CIMCO commonly receives invalid rejects for "TN invalid or unavailable", "feature does not exist", "account disconnected" and "more TNs on order than CSR".²³ In response to a data request, SBC stated it did not track invalid rejects on either a formal or informal basis. SBC also asserts it cannot track re-issued invalid rejects. In order for this Commission to reasonably determine how SBC is performing, it should require that SBC track by CLEC all invalid rejects and all occurrences of repeated or re-issued invalid rejects.

As part of its Reply Affidavit, CIMCO provided data from September of 2002 to present regarding CIMCO orders that SBC invalidly rejected.²⁴ CIMCO documented orders that were initially rejected by SBC (i.e., the order was in reject status) and then accepted by SBC after CIMCO contacted SBC's service center. CIMCO did not have to resend the orders. CIMCO witness Mr. Dvorak explained that the data represents invalid rejects for EDI orders for switched services only (it does not contain manual orders, PRIs or other complex orders).²⁵ Therefore, the data provided by CIMCO should not be seen as a complete representation of SBC's invalid rejects and in fact if manual orders or PRIs were included, the data would indicate a larger number of invalid rejects

²³ CIMCO 2.0 at 1-2.

²⁴ CIMCO 2.0 at 2-3. See also Exhibit A attached to CIMCO 2.0

²⁵ CIMCO 2.0 at 2.

within SBC's ordering process. Whenever SBC invalidly rejects a CIMCO order, CIMCO must spend a significant amount of manpower and time diagnosing the problem and directing a time relevant response to ensure customer satisfaction.²⁶

Approximately nine (9) percent of CIMCO's various EDI switched service orders have been invalidly rejected by SBC.²⁷ Although some of the invalid rejects are less serious than others (for example, there are instances where SBC rejects an order only to accept it minutes or hours later), there are many instances where SBC rejects an order and then accepts it several days later (often seven to ten days later).

As part of his Surrebuttal Affidavit, SBC witness Mr. Cottrell provided a "preliminary" response to CIMCO's invalid reject data, noting that SBC had not had enough time to fully investigate the problem. Mr. Cottrell confirmed that 91 orders CIMCO provided were invalidly rejected by SBC.²⁸ Mr. Cottrell further claimed that 66 of those invalid rejects were due to system errors that have since been fixed.²⁹ Mr. Cottrell emphasizes that SBC believes (as a result of its preliminary investigation) that some of the orders cited by CIMCO were not invalid rejects. He further emphasizes that SBC provided a fix for the cause of 66 of the undisputed invalid rejects.³⁰ However, what he doesn't emphasize is the fact that that leaves 25 undisputed invalid rejects for which SBC apparently does not have a fix. Mr. Cottrell does not provide any details on these invalid

²⁶ Id. at 3.

²⁷ Exhibit A from CIMCO's Reply Affidavit showed 178 SBC invalid rejects from September 2002 to present out of 1,787 orders.

²⁸ Cottrell Surrebuttal Affidavit at ¶32.

²⁹ Id.

³⁰ Id.

rejects and does not state whether SBC plans to investigate the cause(s) of those invalid rejects.

The importance of this issue goes to SBC's ability to provide OSS in a manner consistent with its 271 obligations. Nine percent of the time SBC invalidly rejects a CIMCO order that should be able to proceed through SBC's systems. SBC's inability to process orders correctly diminishes CIMCO's ability to adequately serve its customers and thus effectively compete with SBC.

ii. Invalid USOCs / Invalid Prices

Consistent with prior section 271 orders, a BOC must demonstrate that it provides CLECs with wholesale bills in a manner that gives carriers a meaningful opportunity to compete. The FCC has noted that inaccurate or untimely wholesale bills can impede a CLEC's ability to compete in many ways.³¹ First, a CLEC must spend additional monetary and personnel resources reconciling bills and pursuing bill corrections. Second, a CLEC must show improper overcharges as current debts on its balance sheet until the charges are resolved, which can jeopardize its ability to attract investment capital. Third, CLECs must operate with a diminished capacity to monitor, predict and adjust expenses and prices in response to competition. Fourth, CLECs may lose revenue because they generally cannot, as a practical matter, back-bill end users in response to an untimely wholesale bill from an incumbent LEC. Accurate and timely wholesale bills thus represent a crucial component of OSS.

³¹ See Verizon Pennsylvania 271 Order. 16 *FCC Rcd* 17419. September 19, 2001 at ¶23.

Forte and other CLECs provided documentation of significant problems with SBC's wholesale billing. In particular, as explained by Mr. Waterloo, SBC invoices to Forte routinely contain altogether invalid USOCs or USOCs with invalid pricing. SBC witness Mr. Brown attributes invalid USOCs and prices to human error, and specifically claims that the problems are not due to a systemic problem in SBC's billing procedures. Contrary to SBC's claim, these are not the type of careless errors where a \$455 charge is billed at \$544. Mr. Waterloo explained that Forte's billing dispute is due to systemic problems in SBC's billing system. SBC is not simply transposing letters in USOCs – it is billing altogether inaccurate USOCs to Forte. Likewise, SBC is not transposing numbers on Forte's bills – it is seeking payment on Forte bills that contain altogether inaccurate charges. Mr. Waterloo concluded: "In short, these are not the types of human errors that are bound to occur every so often; they represent embedded systemic software and process errors directly related to SBC's OSS that SBC has not fixed."³² As Mr. Waterloo stated in his initial affidavit, since May of 2002 Forte has never received a bill that is accurate even to 10 percent of the tariffed rates.³³ In 2002, Forte was over-billed hundreds of thousands of dollars on total annual sales of more than one million dollars.³⁴

Forte has had the same billing errors repeated every month since it began providing service via UNE-P. At SBC's request, in August of 2002, Forte submitted documentation to SBC from the ICC, and documentation from SBC to Forte stating that Forte is entitled to receive TELRIC rates. To date, this issue

³² Forte 2.0 (Waterloo) at 5.

³³ Forte 1.0 (Waterloo) at 10.

³⁴ Id.

has not been resolved and virtually every single line item on Forte's bill with a USOC has an incorrect amount associated with it. The time and money Forte spends addressing this problem could be spent elsewhere but for SBC's grossly inaccurate billing. This has been a huge drain on Forte's manpower and requires several man-days per month to calculate the overcharges. Forte presently receives tens of thousands of dollars in incorrect prices on each bill.

SBC has long been aware of this billing issue. Exhibit A³⁵, attached to this brief, is a letter dated July 10th, 1998 stating that SBC will replace the rates in Forte's interconnection agreement with its tariff rates. Exhibit B³⁶, a letter dated August 6th, 1998 from Eric Larson of SBC states Forte is to receive TELRIC rates. These documents were also sent to SBC in August of 2002. This pricing issue should have been resolved in 1998 but Forte is still receiving higher than tariff pricing on all but a few line items on its bill.

SBC witness Mr. Silver addressed this issue in his Surrebuttal Affidavit. With respect to Forte's billing issue, Mr. Silver states "SBC Illinois has taken the necessary steps to update its billing tables accordingly. The changes will be reflected in Forte's next billing cycle."³⁷ It is encouraging that this billing issue may soon be resolved. However, it is notable that SBC has been aware of this issue with Forte since 1998.

This long-standing issue suddenly attracted SBC's attention contemporaneously with the utility's 271 application. If the "carrot" of interLATA

³⁵ The information in Exhibit A, not part of the record in this case, is provided pursuant to the verification (attached to this Brief) of Tom Waterloo, President of Forte Communication, Inc.

³⁶ The information in Exhibit B, not part of the record in this case, is provided pursuant to the verification (attached to this Brief) of Tom Waterloo, President of Forte Communication, Inc.

³⁷ Silver Surrebuttal Affidavit at ¶24.

authority is responsible for resolving wholesale service problems, SBC must be held to its “concessions” in a post 271 environment. SBC should not receive a positive 271 recommendation on this record. However, any ICC decision regarding SBC’s 271 should at a minimum include the requirement that SBC assure the Commission that SBC will fix the deficiencies in its OSS and maintain those fixes on a going forward basis.

iii. Invalid Formatting of Telephone Numbers (TNs)

In its initial and reply affidavits, Forte described the problem of invalidly formatted telephone numbers (TNs). Forte commonly receives invalidly formatted TNs from SBC upon completion of a request for new residential or business POTS. As described by Mr. Waterloo, when Forte receives an invalid TN from SBC, Forte must perform a manual lookup on Verigate by PON number to get the correct TN and manually populate it into its database.³⁸ This is a time consuming and expensive process that could easily be avoided if SBC would improve its systems to provide valid TNs.³⁹ SBC claims that invalidly formatted TNs are human error and are not relevant to SBC’s OSS. That assumption is invalid. SBC tries to protect the asserted quality of its OSS at the expense of its employees – according to SBC everything is human error and therefore not applicable to a 271 review. The real question is why SBC’s OSS requires a manual input from one system to another. The bottom line is that SBC’s OSS should be able to provide correctly formatted TNs to wholesale customers. The

³⁸ Forte 1.0 (Waterloo) at 9.

³⁹ Id.

fact that SBC's OSS is unable to provide correctly formatted TNs illustrates deficiencies in SBC's OSS and is directly related to CLECs' ability to compete with SBC.

SBC witness Mr. Cottrell acknowledged that BearingPoint encountered the TN problem as Observation 700. Mr. Cottrell further states "in order to correct this occurrence, on January 30, 2003, SBC Midwest made a change to the system used by its service representatives to enter these telephone numbers for transmission to CLECs to enforce the proper format."⁴⁰ Mr. Cottrell continues that "the Company believes this issue to be resolved and BearingPoint is presently retesting to confirm."⁴¹ In his Surrebuttal Affidavit, Mr. Cottrell continues to extol the virtues of the narrowly tailored BearingPoint audit, stating "any lingering doubt that this problem is, in fact, fixed was eliminated by BearingPoint, who reported on February 25, 2003 that it had retested Observation 700 successfully."⁴² However, Forte's current data shows that, contrary to SBC's claims (and BearingPoint's audit⁴³), the problem still is not fixed.

The attached Exhibit C⁴⁴ shows that Forte received 66 invalidly formatted TNs between January 29th, 2003 (the date Mr. Cottrell asserted SBC fixed the problem) and March 17, 2003. Of main importance, the third column of Exhibit C

⁴⁰ Cottrell Rebuttal Affidavit at ¶67.

⁴¹ Cottrell Rebuttal Affidavit at ¶67.

⁴² Cottrell Surrebuttal Affidavit at ¶39.

⁴³ The BearingPoint audit was apparently unable to pick-up on this problem. Even though Observation 700 was closed on March 4, 2003 SBC continues to provision invalidly formatted TNs to Forte.

⁴⁴ The information in Exhibit C, not part of the record in this case, is provided pursuant to the verification (attached to this Brief) of Tom Waterloo, President of Forte Communication, Inc.

shows the error message, i.e., the bad TN. The fifth column shows the EDI date. Since SBC allegedly “fixed” the problem, 4.9% out of a total of 1341 completed orders for new lines contained invalidly formatted TNs. This is still a huge problem. To date, SBC has been unable to fix its OSS in order to solve this problem. SBC’s deficient OSS negatively affects Forte’s provisioning and billing operations and fails to provide Forte the ability to effectively compete with SBC.

iv. Order Completions

The performance measures that monitor SBC’s ability to complete orders are mainly focused on the timeliness of SBC’s order completion confirmation.⁴⁵ As described by CIMCO witness Mr. Dvorak, there are numerous other issues beyond timeliness related to order confirmation that CIMCO consistently encounters as a result of Ameritech errors during the order completion phase.⁴⁶ These are errors that would not necessarily be picked up by the BearingPoint and E&Y reports, although they do evidence problems with SBC’s OSS that directly relate to CLECs’ ability to compete.

Mr. Dvorak described how Primary Inter-exchange Carrier (“PIC”) change requests are routinely processed incorrectly by SBC. Mr. Dvorak stated: “When SBC receives such a request it should update the central office switch and corresponding customer service record (CSR). If SBC fails to process a PIC change request, subsequent change orders must be placed in order to update the switch and CSR. In other instances PIC change requests are updated on the

⁴⁵ See Performance measures 7, 7.1, 8.

⁴⁶ CIMCO 1.0 at 5.

CSR but not with the switch. If this happens, traffic continues to be routed to the previous carrier, causing customer dissatisfaction, inaccurate customer billing, and lost or delayed revenue for CIMCO.”⁴⁷ CIMCO frequently experiences this SBC error on UNE-P PRI orders. A final example of SBC order completion errors is when CIMCO submits a UNE-P order and SBC initiates an unnecessary and non-requested facility change (i.e. a ground start to loop start, that results in a customer outage).⁴⁸ In addition to the customer dissatisfaction associated with the customer outage, CIMCO must expend resources to get its customer back in service.

In his Rebuttal Affidavit, SBC witness Mr. Cottrell states that BearingPoint’s conclusion that SBC accurately provisioned switch features contradicts CIMCO’s assertion that Primary Interexchange Carrier (PIC) change requests are routinely processed incorrectly.⁴⁹ Mr. Cottrell bases this assumption on narrow BearingPoint testing. Mr. Cottrell again would have the Commission make a broad conclusion based on narrow BearingPoint testing at the expense of real world CLEC experience dealing with SBC’s OSS.

Mr. Dvorak noted that SBC’s improper handling of these orders requires a manual process even though this should be done on an electronic basis. CIMCO is forced to review all CSRs to ensure the order was typed correctly on the CSR and, subsequently properly entered into the switch logic. This process is extremely burdensome and interferes with how CIMCO develops its systems to

⁴⁷ Id.

⁴⁸ Id. at 5-6.

⁴⁹ Cottrell Rebuttal Affidavit at 32.

handle large volumes of orders. Moreover, SBC's errors negatively impact CIMCO's customer's service through feature and service outages. CIMCO's reputation as a reputable service provider is damaged by these incidents that negatively impact CIMCO's customers. Whether SBC satisfies performance measures based on timeliness does not present the entire picture. There are operational issues surrounding completion notices that directly effect CIMCO and its end users.

v. Working Service Conflicts

Forte's Initial and Reply Affidavits described the problem of SBC's untimely notice to Forte of a working service conflict (also called Worker in the Way) situation. A working service conflict occurs when a customer orders a new line to a location when there is already a line going to the location that could be used.⁵⁰ If SBC determines that there is a working service conflict, SBC is supposed to send a fax to Forte several days before the due date to inform Forte that the installation commitment cannot be made.⁵¹

Forte witness Mr. Waterloo described that more than 80 percent of the time, Forte does not receive the fax from SBC at all, or receives it on or after the due date.⁵² As part of its Reply Affidavit, Forte documented data for February 2003 showing that out of 42 working service conflict faxes received from SBC, 90

⁵⁰ Forte 1.0 at 7.

⁵¹ Id.

⁵² Forte 1.0 at 7. Forte 2.0, Exhibit D.

percent were either for the wrong company⁵³, arrived after the due date⁵⁴, or arrived on the same day⁵⁵ as the due date.

SBC witness Mr. Brown addressed the working service conflict issue in his Surrebuttal Affidavit. Mr. Brown stated that an investigation determined that “some service representatives were ‘batching’ the faxes instead of sending them individually . . . [which delayed] the issuance of many WSC notices to or beyond the service due date.”⁵⁶ To fix the problem SBC instructed its representatives to fax working service conflict forms to Forte every 15 minutes.⁵⁷ Forte has agreed to monitor the Worker-in-the-Way process and report results at the next CLEC user forum. Although this development is encouraging, it is too early to determine if SBC’s “fix” has solved the working service conflict problem.

vi. Invalid Completion Notices

Forte provided documentation that shows that approximately nine percent of the time Forte receives a completion notice from SBC only to find out that Forte’s customer does not have dialtone.⁵⁸ Forte witness Mr. Waterloo described that in this case Forte must initiate a truck roll to the end user’s location in order

⁵³ Forte 2.0, Exhibit D showed that during February SBC mistakenly sent five (5) working service conflict faxes to Forte that should have been sent to Vartec (another telecommunications carrier). This raises a whole other issue regarding SBC’s OSS. This data shows that SBC’s working service conflicts are not only untimely but also inaccurate.

⁵⁴ Forte 2.0, Exhibit D showed that 28 (67%) of the faxes arrived late – that is, after the original FOC date. Ten (10) of those faxes were between 4 and 8 days late.

⁵⁵ Forte 2.0, Exhibit D showed that 4 of the faxes arrived on the due date. As explained in Forte’s Initial Affidavit, faxes that arrive on the due date are untimely because Forte does not have adequate time to inform its customer that SBC cannot honor its commitment. Forte’s customer has likely made arrangements to be present at installation (e.g., taken time off work or altered other commitments). In almost all instances a same day fax by SBC is too late for all parties involved.

⁵⁶ Brown Surrebuttal Affidavit at ¶9.

⁵⁷ Id.

⁵⁸ Forte 2.0 at 11-12.

to perform a cross connect of the outside wiring to the inside wiring at the network interface device (NID). However, Forte's technician often discovers that there is no dialtone at the network interface – SBC's completion notice was invalid.⁵⁹ Forte must then initiate a trouble ticket with Ameritech and then do another truck roll after the trouble ticket is resolved. This more than doubles the cost of the truck roll for Forte.⁶⁰ Moreover, SBC begins billing too soon – before Forte's customer even has service. During this time Forte's customer is out of service awaiting SBC's provision of dialtone. From December 1, 2002 until January 24, 2003, out of 1053 new POTS lines for which SBC issued completion notices, 97 of the lines (9%), did not have dialtone.⁶¹

SBC witness Mr. Muhs' Surrebuttal Affidavit addressed this issue for the first time. Mr. Muhs asserts that this is solely a provisioning issue, unrelated to SBC's OSS. On the contrary, although faulty provisioning initiates the problem, SBC's failure to check for or report no dialtone exposes defects in SBC's OSS. The first defect in SBC's OSS is that SBC submits a completion notice to the CLEC even though service to the customer was not completed. Mr. Muhs points to PM 35 which tracks the percent of trouble reports that occur within 30 days of installation.⁶² However, this isn't a trouble report situation in which the customer had service and then something went wrong, necessitating the filing of a trouble report. Here, the customer never had dialtone, but SBC nevertheless issued a completion notice. The second OSS defect that is exposed is the fact that in an

⁵⁹ Id.

⁶⁰ Id.

⁶¹ In its Reply Affidavit, Forte corrected its Initial Affidavit where it inadvertently reported that 187 (or 17%) of new POTS lines did not have dialtone.

⁶² Muhs Surrebuttal Affidavit at ¶4.

invalid completion notice situation SBC initiates billing to the customer too soon – before the customer even has dialtone. When SBC issues an invalid completion notice it begins to bill the CLEC for this “phantom” service. Thus, invalid completion notices directly affect the ordering and billing aspects of SBC’s OSS.

Mr. Muhs also points out that PM 35 is subject to a parity standard and further claims that Forte’s percent trouble tickets that occur within 30 days of installation falls within the required parity performance for the time period. However, a parity standard is not an accurate measure for invalid completion notices. An invalid completion notice by SBC to a CLEC is much harder to remedy than an invalid completion notice by SBC to itself. CLECs must incur the additional truck roll and other expenses.

When SBC Retail works a trouble ticket for no dialtone with a retail account, the SBC technician can complete the work in one truck roll.⁶³ However, a CLEC with the same problem must first go to the customer premises and diagnose that the problem is not an inside wiring problem, but instead a failure of SBC to provide dialtone at the network interface. Then the CLEC places a trouble ticket with SBC. Upon completion of repair, the CLEC must perform a second truck roll to complete the cross connect. Thus, the CLEC performs two truck rolls as opposed to just one for SBC for the same problem. Although Forte has billed Ameritech \$71 for the additional truck rolls Forte has incurred, SBC

⁶³ The information in paragraphs 4 through 7 of this section, not part of the record in this case, is provided pursuant to the verification (attached to this Brief) of Tom Waterloo, President of Forte Communication, Inc.

has not paid Forte one dime for services and has notified Forte that SBC never ordered any repair work to be done by Forte.

Additionally, Forte submitted a CCR in the CLEC user Forum in May of 2002 requesting that CLECs have access to place tone on the line from the central office, just as SBC is able to when looking for a specific cable and pair. This is a very helpful diagnostic tool to locate a customer's new line in a multi-dwelling residence. At the CLEC user forum SBC has stated that since it does not perform a truck roll on every installation many new CLEC POTS installs are not tagged. Having tone on the line allows a technician the ability to move his inductive amplifier or "wand" over the binding posts until a tone is heard through the wand's speaker, thus locating a specific pair of wire out of possibly hundreds of wires.

In July of 2002, Forte successfully completed testing with SBC to place tone on the line to lines from SBC's four different switch types. This is the same system that Ameritech uses on a daily basis to put tone on the line for its customers. Nevertheless, the tests were successful, but to date, Forte still is not allowed to use this functionality. In January 2003, tone on the line was dropped from the CLEC user forum agenda. Forte has escalated the problem, but to date Forte still does not have the ability to put tone on the line.

Forte has great many customers living in high-rise apartment buildings. Without tone on the line, Forte has to check every binding post via caller id to see if that binding post contains our new customer's line. Additionally, binding post

information is not posted on the web tool bar until 24 to 48 hours after the order completes, further leaving CLECs out in the dark as to where new lines are located. Although cable and pair assignment is temporarily put on the web tool bar, this information is removed from the web tool bar once the order completes. Cable and pair assignments, binding post information, and tone on the line are all available to SBC retail technicians and not available to CLECs at all or in a delayed or shortened time period, which only adds to the problem and adds expense to CLECs.

vii. Assume As Is / Assume As Specified

As CIMCO witness Mr. Dvorak described in his Initial Affidavit, CIMCO often converts retail and resale circuits to UNE-P without any changes in the existing specific services and encounters unnecessary obstacles from SBC's OSS systems. In LSOR 4.02, on an "Assume As Is" (which only apply to Centrex/Data/ISDN contracts), the Special Pricing Plan ("SPP")/("VTA") information is not necessary. However, SBC's LSOR5 requires the VTA field to be populated, whether it is an "Assume As Is" or an "Assume As Specified". If the VTA field is left blank, SBC will remove the contract and bill termination charges, not to CIMCO, but directly to the end user customer. This is an insidious process whereby a new CIMCO customer could unexpectedly be hit with a \$20,000 bill from SBC. Once again, SBC's updated LSOR5 EDI takes a step backwards compared to its LSOR4.02. SBC's change in process makes

ordering more labor intensive and less efficient for CIMCO. Moreover, CIMCO is exposed to greater risk on SPPs.

II. SBC's "Compromise" Remedy Plan

Although it is not an explicit requirement that a BOC be subject to a remedy plan mechanism for section 271 approval, the FCC has stated that the existence of a satisfactory remedy plan is probative evidence that the BOC will continue to meet its section 271 obligations after a grant of such authority.⁶⁴ Thus, the remedy plan must assure that SBC will not backslide if the ICC provides a positive recommendation to the FCC. SBC's proposed "compromise" plan is inadequate. Staff and the CLECs have demonstrated that SBC's proposed "compromise" remedy plan would not prevent backsliding, and would in fact encourage backsliding by SBC. Staff witness Ms. Patrick further recommended that any positive ICC 271 recommendation to the FCC should be conditioned on SBC's agreement to follow the ICC-approved 01-0120 Remedy Plan.⁶⁵

Finally, the Commission should not even be considering changes to the 01-0120 Remedy Plan. That plan was adopted last year after considerable effort on behalf of the Commission, SBC and interested parties. That plan created rights for CLECs and obligations by SBC that cannot be discarded with little evidence and no time to evaluate that evidence, simply because SBC claims that

⁶⁴ Ameritech Michigan Order, 12 FCC Rcd at 20748-50, ¶¶393-398.

⁶⁵ Staff Ex. 50.0 (Patrick) at ¶3.

the 01-0120 plan is more stringent than other Bell Operating Company (“BOC”) Section 271 remedy plans. Based on the evidence carefully considered in 01-0120, this Commission found that this BOC needed incentives beyond those given by other Commission’s to their BOCs. SBC has done nothing since then to show that it can be trusted to behave properly without strict incentives. The Commission was correct then and would be correct now if it informs SBC that Section 271 approval will be withheld unless it commits to the Docket 01-0120 remedy plan.

A. SBC’S “COMPROMISE” REMEDY PLAN IS JUST A “SHELL” OF THE COMMISSION-APPROVED 01-0120 REMEDY PLAN.

SBC’s “compromise” remedy plan includes significant differences compared to the Commission-approved 01-0120 remedy plan:

- SBC has cut base payments by one half;
- SBC has eliminated priority levels, which may not be objectionable in itself, but unfortunately, the level of payment for all types of events and the per measure caps have been set at levels at the low end of the former payment scales, thus further minimizing the base payments;
- The “index value” component of the formula, which rewards SBC for improving overall performance, further lowers payments for individual events and for the overall cap;
- The “ceiling” in the plan eliminates payments where SBC’s performance serving CLEC is below its performance for its own customers and affiliates if the performance exceeds an arbitrary level.

Mr. Dvorak testified that CLECs must receive liquidated damages that compensate them for their losses caused by SBC’s failures. In Docket 01-0120,

the Commission made an attempt to set liquidated damages at a level that provided CLECs with such fair compensation. The effect of the changes made in the “Compromise” plan is that CLECs will not receive an amount in liquidated damages that covers their costs resulting from SBC’s failures.⁶⁶ SBC’s primary justification for the changes is that it wants incentives to improve its service to CLECs. While it is appropriate for the Commission to ensure that the remedy plan gives SBC incentive to improve its performance, it should be remembered that another equally important goal should be to compensate CLECs for their losses. As Mr. Dvorak stated: “regardless of the priority of a particular item, and regardless of SBC’s overall performance for CLECs or its own customers and affiliates, CLECs must be compensated for their losses.”⁶⁷

In summary, SBC’s “comprise plan” contains various methods of reducing payments to CLECs and thus ensuring that they are not made whole each time SBC fails to meet its performance measures. Additionally, Mr. Dvorak noted that CLECs are not compensated each time SBC makes an error. Instead, under the remedy plan, CLECs are only compensated when SBC fails the performance measures. Mr. Dvorak noted that there are many times when CIMCO must devote resources to correcting an SBC error, yet because that error was not part of the performance measurements, CIMCO received no compensation. He stated that CLECs such as CIMCO expend considerable resources and man-

⁶⁶ CIMCO Ex. 1.1, pp. 1-2.

⁶⁷ Id. at 2.

hours to fix problems caused by SBC.⁶⁸ Most importantly, Mr. Dvorak stated that poor service from SBC may cause CLECs to lose customers.⁶⁹ While there is no formula that allows CLECs to recover those losses, at the very least, they should be compensated for their more quantifiable losses. That is what the remedy plan in Docket 01-0120 attempted to accomplish. Ameritech's attempt to water down that plan will result in CLECs not being fairly compensated for their losses.

B. SBC'S "COMPROMISE" REMEDY PLAN DOES NOT ADEQUATELY COMPENSATE CLECs FOR POOR SBC PERFORMANCE.

CIMCO and Forte provided evidence that their respective companies would not be adequately compensated for poor SBC performance under SBC's "compromise" remedy plan.⁷⁰ Mr. Dvorak noted that one of the purposes of a liquidated damages provision in a contract is to avoid the time and expense of litigating the amount of losses one party suffers when the other breaches a contract, particularly when such damages are often difficult to calculate in a precise manner. Thus, just like contract provision of liquidated damages, the remedy plan is designed to offset costs CLECs incur when SBC fails to deliver the level of service to which they have previously agreed. Mr. Dvorak stated that those costs include the salaries and benefits of personnel that must resubmit orders, follow-up with SBC on orders, track and report problems internally and to SBC, communicate with our customers on delays or generally spend time that

⁶⁸ Id. at 2.

⁶⁹ Id. at 2-3.

⁷⁰ See CIMCO's and Forte's respective Initial Affidavits on the Remedy Plan Issue (CIMCO 1.1 and Forte 1.1).

would not have been spent if SBC had met its performance obligations. He estimated that the extra work caused by SBC's failures costs CIMCO \$112,400 per month. Additionally, CIMCO must issue credits of approximately \$10,000 per month to customers because of SBC's problems such as ordering errors or incorrect information. Mr. Dvorak further explained that errors and delays cost CIMCO revenue and margin opportunities of approximately \$5,000 per month. Finally, he stated that CIMCO has lost customers due to delays caused by SBC's failures. Although he noted that it is difficult to calculate the losses that CIMCO has incurred from losing customers, Mr. Dvorak estimated that CIMCO has lost customers, either in part or in total, with monthly revenues of \$36,000 due to SBC failures.⁷¹

In summary, the base amounts ordered by the 01-0120 remedy plan only partially mitigate CLEC's costs that they incur when SBC fails to perform. Given these expenses, it is clear that no changes should be made to the base amounts in the 01-0120 remedy plan.

C. THE "COMPROMISE" BASE AMOUNTS ARE REDUCED BELOW THE 01-0120 LEVELS IN MULTIPLE WAYS.

The most obvious reduction SBC proposes simply cuts the base amounts in half. SBC has not shown that the figures established by this Commission in Docket 01-0120 are excessive. As explained above, CLECs experience numerous costs when SBC fails to perform. The Commission attempted to set

⁷¹ Id. at 3.

the 01-0120 remedy plan liquidated damages at a level that at least attempts to compensate CLECs for their losses. SBC is now proposing to cut those levels in half, with no evidence supporting such a drastic cut

Mr. Dvorak gave perhaps the most graphic reaction of CLECs to the level of the performance measures. Given the choice between remedy payments at the level set in 01-0120 and proper performance by SBC, CIMCO would much rather receive proper performance from SBC. With better performance, CIMCO could devote its resources to obtaining new customers and providing better service to existing customers.⁷²

The second method used by SBC to reduce base payments was to eliminate the priority scale for payments and then assigned payment levels close to the 01-0120 plan's lowest priority occurrences. Mr. Dvorak provided an example. Under Section 8.2 of the Docket 01-0120 plan, in month 1, a CLEC would receive \$50, \$150 and \$300 respectively for Low, Medium and High priority occurrences. Under Table 1 of the Compromise plan, payment per occurrence would be between \$35 and \$150 depending on the Index Value. Given the likelihood that the Index Value will be the highest (>92%) or second highest (between 86% and 92%), the payment would most likely be between \$35 and \$50. Thus, an occurrence in a category deemed to be "high" in Docket 01-0120 would result in a payment of \$300. Under the "compromise" plan, that same occurrence would result in a payment of only \$35 to \$50. The choice of per measure cap is also skewed toward the bottom end of the 01-0120 scale. In

⁷² Id. at 4.

month one under the Docket 01-0120 plan, the cap would be \$10,000, \$20,000 and \$50,000 for respectively, Low, Medium and High priority occurrences. Under the Compromise plan, the cap would be \$9,000 at the >92% overall performance level and \$12,000 if performance is between 86% and 92%.⁷³

SBC claims that this elimination of the priority scale is something desired by CLECs. SBC is being disingenuous. While some CLECs objected to the priority scale in Docket 01-0120, those CLECs were not proposing that levels be set at the lowest possible levels like SBC has done here. Assuming that the total payments under the old priority scale were appropriate, the proper level if they are eliminated would be the weighted average of the old three levels of payments. Setting the payment at the low end of those payments guarantees a windfall for SBC.

D. THE BASE AMOUNT SHOULD BE A PAYMENT FLOOR

The Commission should not treat the “Base” amount as an average of the payments that would provide CLECs with reimbursement for their costs. It is a base that should be treated as a floor. Thus, the remedy plan in Docket 01-0120 appropriately raises payments in certain circumstances, such as consecutive months of SBC failure in order to provide the company with incentive to improve its overall performance. Such increases from the base liquidated damages figure meet the second goal of the remedy plan of providing SBC with incentive to improve. SBC’s Compromise plan, however, is designed to set liquidated

⁷³ Id. at 4-5.

damages below the level needed to compensate CLECs for their losses. It does so as discussed below.

i. SBC's Index Value

The Compromise plan reduces payments to individual CLECs and reduces the cap on each performance measure if SBC meets certain targets each year. SBC's change to the 01-0120 plan significantly reduces remedies from the level established as liquidated damages needed to compensate CLECs for their losses. Table 1 of Attachment Z shows that if SBC performs at a level between 86% and 92% over a three year period, payments per occurrence would be \$35 in year one, \$30 in year two and \$25 in year three. Mr. Dvorak noted that this raises two issues. "First, why should SBC be rewarded for allowing its performance to deteriorate?"⁷⁴ Mr. Ehr's initial affidavit shows that SBC met 88% of its performance measures in two of the three months of September through November 2002 and it met 93% of the measures that were subject to the 01-0120 remedy plan. Under the Compromise Plan, SBC's payments will fall if its performance deteriorates from those historic levels. SBC has also proposed that the cap in liquidated damages per measure falls if SBC maintains mediocre performance over three years. For example, the cap falls from \$20,000 to \$15,000 in the third year if its performance is between 74% and 80%. Mr. Dvorak noted: "That isn't rewarding mediocrity; it is rewarding incompetence. It would be a gross understatement to say that the Commission would be

⁷⁴ Id. at 5.

concerned if SBC were performing at a 75% rate in two years. We would all be discussing lawsuits and indictments, not rewards.”⁷⁵

Mr. Dvorak’s second point was that payments should never fall below the level that is determined to be necessary to compensate CLECs. He stated:

If a CLEC’s damages from SBC’s poor performance are determined to be \$35 per occurrence, then any payment below that level fails to make the CLEC whole. The costs incurred by one CLEC as a result of SBC’s failures do not change if SBC happens to increase its overall performance on all measures with all other companies. CLECs must be made whole for SBC’s performance lapses.⁷⁶

In summary, meeting the goal of giving SBC incentive to improve should not be met by failing to compensate CLECs for their losses. If the Commission wishes to provide SBC with additional incentives, it should be done in a way that recognizes the trend that SBC has already been improving its performance. Thus, the Commission could order an increase payments if SBC fails to continue to improve or backslides. But the plan should never reward SBC with lower payments that do not compensating CLECs for their losses.

ii. The Ceiling On Performance Expectation

SBC has proposed a new ceiling on performance based on the concept that SBC should be allowed to provide CLECs with service that is inferior to the service provided to its own customers and its affiliates, as long as the

⁷⁵ Id. at 6.

⁷⁶ Id. at 6-7.

performance for CLECs is above some arbitrarily chosen level of “adequate” performance. Mr. Dvorak noted:

This “ceiling” on performance allows SBC to violate one of the most basic principles of the remedy plan – to ensure that its CLEC performance is not inferior to its performance for its own customers or its affiliates. SBC should never be allowed to provide itself with better service.⁷⁷

The advantage of requiring SBC to provide service to CLECs that is comparable to that provided to SBC’s own customers and affiliates is that the level of required performance is easy to identify. Either SBC provides comparable service or it faces penalties. Allowing SBC to set an arbitrary level based on its own guesses as to what would be “good enough” opens a Pandora’s box of issues that will lead to countless squabbles and in the end, result in SBC providing inferior service to CLECs..

Conclusion

On the record before this Commission, SBC has not demonstrated compliance with Section 271 standards. The BearingPoint audit demonstrated significant deficiencies in SBC’s OSS. Data supplied by various CLECs confirmed the deficiencies documented by BearingPoint and identified further deficiencies in SBC’s OSS and billing systems. As noted by Staff, during this time when SBC is putting “its best face forward”, SBC’s performance is

⁷⁷ Id. at 7.

apparently as good as it is going to get. Therefore, for the OSS issues that SBC must fix and/or update, the Commission must withhold a positive recommendation to the FCC until SBC demonstrates compliance. Furthermore, the Commission should demand assurance from SBC that if it achieves compliance with its 271 obligations, SBC will maintain compliance on a going forward basis.

Even given the deficiencies documented by BearingPoint and CLECs, SBC attempts to reduce its remedy plan obligations below those adopted by the Commission in Docket 01-0120. The “compromise” remedy plan payments would not adequately mitigate CLEC damages for losses caused by poor SBC performance. Very simply, CLECs would rather have SBC perform properly than receive remedy payments for poor service quality. SBC’s attempt to reduce those payments with its “compromise” plan should be soundly rejected by this Commission. SBC should be sent the message that as part of any positive Section 271 recommendation, it must continue to abide by the Commission-approved Docket 01-0120 remedy plan.

Respectfully submitted,

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Dated: March 25, 2003

STATE OF ILLINOIS)
)
COUNTY OF COOK) SS

VERIFICATION

I, Tom Waterloo, President of Forte Communications, Inc., being first duly sworn, deposes and states that the letters attached as Exhibits A and B to the Initial Brief are true and correct documents; the data compiled by Forte (as Exhibit C to the Initial Brief) is true and correct; and the statements made in paragraphs 4-7 in Section I.B.vi of the Initial Brief are true to the best of my knowledge, information and belief.

Tom Waterloo

SUBSCRIBED AND SWORN to
before me this 25th day of March, 2003.

Notary Public

My commission expires on _____.